STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP965-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CLINTON D. CLUCAS,

Defendant-Respondent.

On Appeal from an Order Partially Denying the State's Motion to Admit Other Acts Evidence, in Portage County, the Honorable Thomas Eagon, Presiding

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BRIEF OF DEFENDANT-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court erroneously exercise its discretion when it partially denied the state's motion to admit other acts under *Sullivan* and Wis. Stat. § 904.04(2)?

No, the circuit court applied the proper legal standard and correctly declined to admit the other acts as evidence because the acts were offered for improper or unexplained purposes, had little relevance to the case, and were unfairly prejudicial.

This court should affirm the circuit court's evidentiary ruling.

2. Did the circuit court err in ruling that the state would be required to present live witness testimony to the jury in the event that it was able to present other acts evidence?

No, the circuit court has discretion to dictate the mode of presentation of evidence at a trial, consistent with the rules of evidence.

This court should affirm the circuit court's ruling.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Clucas does not request oral argument or publication, as this issue is a simple application of specific facts to well-established case law.

STATEMENT OF FACTS AND CASE[1]

On May 28th, 2021, Clinton Clucas was charged with Misdemeanor Bail Jumping and Disorderly Conduct with a Domestic Abuse Enhancer pursuant to Wis. Stat. § 973.055. (2:1). The charges stem from an incident on March 8th, 2021, involving Clucas and his wife, K.C. (2:2). Clucas and K.C. were in the middle of getting a divorce. (2:2). According to the complaint, K.C. went to Clucas's home to pick up their children. *Id.* As K.C. and the children were leaving, Clucas's father was outside the home and asked to say goodbye to the children. *Id.* At this time, Clucas came outside and confronted K.C. *Id.* Clucas allegedly accused K.C. of spreading lies about him and, according to the Victim Worksheet, threatened K.C. (25:2, 5). When K.C. "kinda laughed" at him and started to walk by him, Clucas allegedly hit her with his open palm on the back of her head. (2:2). This alleged action did not create a mark on K.C.'s head, and K.C. did seek any medical attention. *Id.*

[1] This brief was prepared with contribution from law school intern Kyle Minden.

Prior to trial, the state moved to admit four other acts as evidence under Wis. Stat. § 904.04(2)(b)(1). At the motion hearing, the state argued that *Sullivan,* under the greater latitude principle, applied and listed five purposes for admission: "pattern-of-behavior" by the defendant, motive, intent, absence of mistake or accident, and to buttress the credibility of the witness. (50:3). The state then extrapolated on the pattern of behavior purpose, arguing that these acts show the defendant's tendency to engage in abusive contact when he "feels that the relationship is showing signs of deterioration." *Id.* The court immediately questioned whether this was a propensity purpose, to which the state simply replied "Your honor, it's a pattern-of-behavior argument." (50:4).

The state then attempted to connect each other act to this pattern-of-behavior purpose. While explaining each act, the trial court interjected to note that the level of violence differed between the incident at issue and the first two other acts. (50:5). The state asserted that "the probative value does not outweigh the potential for unfair prejudice because these other acts factor or substantially outweigh the prejudice in the present case." (50:10). The court later stated that "motive and intent" aren't elements of the offense, and cited *State v. Dorsey* to question whether these purposes were relevant even under the greater latitude principle. (50:12,19). The state argued that motive and intent were still proper purposes for admitting other acts evidence, even if they are not elements of the offense. *Id.*

In response, the defense counsel argued that state's other acts didn't pass *Sullivan*'s three-step test for admitting other acts evidence under the greater latitude rule. (50:13). After hearing both parties, the court ruled on each of the four other acts offered by the state:

The first other act occurred on June 20, 2013 with the Clucas's previous girlfriend, E.V. ("Act 1"). (25:9). Clucas pled guilty to Battery and Disorderly Conduct charges and pled no contest to a Criminal Damage to Property charge. (25:11). A Strangulation charge was dismissed. (25:12). For Act 1, the trial court found that dissimilar facts and circumstances barred admission under *Sullivan*. (50:21-22). Specifically, the court found that Act 1 was with a different victim, involved actions that were significantly more violent, and occurred many years prior to the current charge. *Id.* These differences, the court reasoned, meant that Act 1 had low probative value, while the risk of prejudice seemed high given that this incident was significantly more violent and threatening compared to the alleged act in the current case. *Id.* As a result, the court denied the state's motion to admit Act 1.

The second other act ("Act 2") was a similar incident that occurred in 2013 between Clucas and the same previous girlfriend, E.V. Clucas pled guilty to Battery and Misdemeanor Bail Jumping charges, while Disorderly Conduct and Felony Bail Jumping charges were dismissed but read in. (26:6). The trial court denied this act from admission, finding that

while these cases had some similarities, Act 2 did not seem to be essential to proving the state's case. (50:22). Additionally, the significant time lapse between acts and differing victims also lowered the act's probative value. *Id.* The court found that the risk of prejudice outweighed Act 2's probative value. *Id.*

The third other act offered ("Act 3") occurred over two years before the current charge with the defendant's then wife, K.C. No charges were ever filed in connection with this incident. (26:8-10). The court found that Act 3 was not particularly relevant to the case at hand. (50:20-21). The court also found that Act 3 was likely to confuse the jury because the impetus for Clucas's alleged actions were unclear. (50:21). Additionally, trial court ruled that "the prejudicial impact exceeds the probative value" and denied admitting Act 3. *Id.*

The fourth incident ("Act 4") occurred on June 23rd, 2020, with K.C. at her home. (26:12). At this time, K.C. and Clucas were in the middle of a divorce. *Id.* Clucas was charged with Disorderly Conduct and pled no contest. (26:14). The trial court granted the state's motion to admit Act 4 as other acts evidence, citing its relevance in setting the context of the defendant's relationship with K.C. during their divorce. (50:20). This ruling is not in dispute on appeal. The state on appeal seeks to overturn the trial's court decision declining to admit Acts 1, 2, and 3 as other acts evidence at trial. (State's Brief at 16).

After considering each other act, the court ruled that the state may re-new their motion if circumstances change at trial. *(*50:22). While the state previously informed the court that it intended to introduce the complaints and police reports to prove other acts, the state did not clearly indicate whether live testimony would also be presented. (50:10-11). In response, the court in its ruling cautioned that "the state would need to have witnesses with personal knowledge of these incidents if they want to bring it in." (50:22).

ARGUMENT

I. The trial court properly exercised its discretion in declining to admit other acts evidence under *Sullivan*.

A. This court must review the circuit court's admission or exclusion of other acts evidence using an erroneous exercise of discretion standard.

When determining whether a trial court properly admitted or excluded evidence under Wis. Stat. § 904.04(2)(b)(1), the appellate court must review using an erroneous exercise of discretion standard. *State v. Dorsey*, 2018 WI 10, ¶24, 379 Wis. 2d 386, 906 N.W.2d 158; *State v. Hurley*, 2015 WI 35, ¶28, 361 Wis. 2d 529, 861 N.W.2d 174; *see also State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30, 36 (1998) ("The applicable standard for reviewing a circuit court's admission of other acts

evidence is whether the court exercised appropriate discretion").

This deferential standard prohibits reviewing courts from overturning a lower court's ruling unless the trial court applied an improper legal standard or made a decision that was not reasonably supported by the record. *State v. Jackson*, 2014 WI 4, ¶45, 352 Wis. 2d 249, 841 N.W.2d 791; *Dorsey*, 2018 WI 10, ¶24. Courts reviewing decisions made under this standard cannot consider whether they would have made the same decision, nor does this standard tie appellate courts to the trial court's stated rationale. *State v. Davidson*, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606; *State v. Hurley*, 2015 WI 35, ¶29.

Instead, this court must affirm the lower court's ruling if "there is any reasonable basis for the trial court's discretionary decision." *Davidson*, 2000 WI 91, ¶53; *Dorsey*, 2018 WI 10, ¶24; *Hurley*, 2015 WI 35, ¶28.

While the state suggests this court should review the circuit court's decisions de novo, binding case law repeatedly demonstrates that courts must employ an erroneous exercise of discretion standard. *See supra.* Under this standard, this court must affirm the trial court's exercise of discretion unless it applied an improper legal standard or made a decision not reasonably supported by the record.

B. The circuit court correctly applied the proper legal standard by applying the *Sullivan* analysis in the context of greater latitude.

The circuit court correctly interpreted and applied Wis. Stat. § 904.04(2)(b)(1) by employing the *Sullivan* analysis in a greater latitude context. The Wisconsin Supreme Court has repeatedly held that Wis. Stat. § 904.04(2)(b)(1) does not relieve trial courts of their duty to scrutinize other acts evidence under the *Sullivan* analysis. *State v. Gutierrez*, 2020 WI 52, ¶29, 391 Wis. 2d 799, 943 N.W.2d 870*; see also Davidson*, 2000 WI 91, ¶52 ("Although the greater latitude rule permits more liberal admission of other crimes evidence, such evidence is not automatically admissible"). In fact, the Court in *State v. Dorsey* interpreted Wis. Stat. § 904.04(2)(b)(1) to *require* courts to employ the *Sullivan* analysis for each prong. *Dorsey*, 2018 WI 10, ¶33; *see also Gutierrez*, 2020 WI 52, ¶29.

In the circuit court, the parties agreed that the offered other acts should be subject to *Sullivan* in the greater latitude context. (50:3, 13, 15). However, in its brief in chief, the state misrepresents established case law by now claiming that other acts evidence under Wis. Stat. § 904.04(2)(b)(1) "is admissible" unless it violates the defendant's fundamental due process rights. (62:13-14).

The state's current argument is not only inconsistent with its position in the trial court, but binding case law contradicts the state's current argument, as other acts evidence, even under the greater latitude rule, is not automatically admissible; trial courts still must apply *Sullivan,* but do so with greater latitude, when faced with evidence offered under Wis. Stat. § 904.04(2)(b)(1). *Dorsey*, 2018 WI at ¶33.[2]

In this case, the circuit court applied the correct legal standard by engaging in a greater latitude *Sullivan* analysis. During briefing and the motion hearing, the parties all agreed that *Sullivan* and *Dorsey* applied, and the court acknowledged the same. (50:3,13,15,19). The trial court's decision contained a proper application of the admissibility of the proffered acts in the context of both *Sullivan* and greater latitude. (50: 3-4, 19-22).

For example, the circuit court properly considered prong one of *Sullivan* for all of the proffered other acts when it discussed whether the state's "pattern of behavior" purpose was proper and similar to the purposes considered in *Dorsey*. (50:3-4,19). This reference shows a clear application of *Sullivan* in the context of greater latitude.

[2] The appellant later concedes that the statute requires trial courts to conduct a *Sullivan* analysis using this greater latitude principle. Appellant Br. 12.

The trial court also properly considered *Sullivan*'s second prong, relevance, by discussing each act's relevance and probative value. (50:19-22). The court again referred to *Dorsey* when questioning whether the other acts were relevant to the defendant's intent and motive, considering those were not elements of the charged offenses. (50:19).

Finally, the trial court properly considered the third *Sullivan* prong when it determined that the probative value of the three other acts was substantially outweighed by their risk of unfair prejudice. (50:20-22).

The parties discussed the relevant case law in briefing and during the motion hearing. The parties' concessions and the court's regular reference to *Dorsey* and application of *Sullivan* demonstrates the court understood and applied the proper legal standard. The state's discontent with the court's ruling and current attempt to sidestep the correct legal standard, by arguing that other acts evidence "is admissible" under Wis. Stat. § 904.04(2)(b)(1), should not detract from this court's obligation to uphold the trial court's proper application of *Sullivan* in this case.

C. The circuit court reasonably applied *Sullivan*'s three prong test when they denied the state's request to present other acts evidence.

Sullivan's three prong test applies to other acts evidence offered under Wis. Stat. § 904.04(2)(b)(1). *Dorsey*, 2018 WI 10, ¶33. While other acts evidence

only has to fail one of *Sullivan*'s prongs to be inadmissible, the court reasonably found that Acts 1, 2, and 3 fail all three prongs.

i. The court properly applied *Sullivan* to exclude Act 1, Act 2, and Act 3 because the state did not provide a permissible purpose for their admission.

Sullivan's first prong requires that other acts evidence be offered for a permissible purpose under Wis. Stat. § 904.04(2)(b)(1). *Sullivan*, 216 Wis. 2d at 783. While the first *Sullivan* prong is the least demanding, courts must still bar other acts evidence offered solely for a propensity purpose. *State v. Marinez*, 2011 WI 12, 331 Wis. 2d 568, 797 N.W.2d 399. Even under the greater latitude principle, propensity evidence is prohibited because it invites the jury to focus on the accused's character. *Sullivan*, 216 Wis. 2d at 783; *see Whitty v. State*, 34 Wis. 2d 278, 291-92, 149 N.W.2d 557, 563 (1967). Shifting focus to the defendant's character "magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." *Sullivan*, 216 Wis. 2d at 783; *see Whitty*, 149 N.W.2d 557, 563.

Although "character" is not defined in state statutes, the Wisconsin Supreme Court, deciding a similar evidentiary issue, held that an individual's "character is evinced by a *pattern of behavior*." *State v. Eugenio*, 219 Wis. 2d 391, 404, 579 N.W.2d 642 (1998)

(emphasis added); *see also Elias v. State*, 93 Wis. 2d 278, 286 N.W.2d 559 (1980) (where the court at sentencing held that a defendant's "pattern of behavior…is an index [for] the defendant's character").

While other acts cannot be offered solely for a propensity purpose, Wis. Stat. § 904.04(2)(a) lists acceptable purposes to pass this first prong. However, parties may not list a litany of acceptable purposes; instead, parties should "explain how the other acts evidence [is] related to an acceptable purpose." *State v. Jackson*, 2014 WI 4, 352 Wis. 2d 249, 841 N.W.2d 791. In *Jackson*, the defendant sought to introduce other acts evidence with the professed purpose of showing the alleged victim's "motive, opportunity and lack of accident or mistake." *Id.* at ¶41. The defendant never explained how the other acts advanced any of the proper purposes, leading the Wisconsin Supreme Court to hold that the defendant did not meet this first *Sullivan* prong. *Jackson*, 2014 WI at ¶58. This ruling in Jackson conforms to the broader appellate practice of declining to consider insufficiently developed arguments on appeal. *See, e.g.*, *Barakat v. Wisconsin Dep't of Health & Soc. Servs.*, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995) (where the court declines to consider an "amorphous and insufficiently developed argument").

In the case at hand, the trial court reasonably found that the state failed to offer or explain a single permissive purpose for admitting Acts 1, 2, and 3, when it questioned how this evidence was being admitted for a proper purpose instead of as

inadmissible propensity evidence. (50:4). Because character is "evinced by a pattern of behavior," it is reasonable to conclude that the court found the state's "pattern-of-behavior" purpose was simply a propensity purpose under another name. *Eugenio*, 219 Wis. 2d at 404.

While the state listed a number of other purposes at the motion hearing, briefly mentioning intent, motive, and absence of mistake or accident, the state only references them further in support of their "pattern of behavior" purpose. (50:12, 19). This is nothing more than a generic list of permissible purposes without any developed argument as to how the other acts serve these purposes. As *Jackson* demonstrates, this proffer does not and cannot meet *Sullivan*'s first prong. *Jackson*, 2014 WI at ¶58. The court's denial of the state's request is consistent with this. Additionally, the state solely develops its pattern-of-behavior purpose on appeal. (62:14). As a result, this court should not consider any of the other, insufficiently developed purposes as a basis for reversing the trial court's ruling.

Even given the leniency of *Sullivan*'s purpose prong under the greater latitude principle, the state failed to offer a single permissible purpose. As a result, this court should uphold the trial court's discretionary decision to deny admission of the other acts evidence offered by the state.[3]

[3] While this prong alone should compel this court to uphold the lower court's decision, further analysis under

ii. The circuit court reasonably found that all three other acts were not relevant under a greater latitude *Sullivan* analysis.

The circuit court reasonably found that Acts 1, 2, and 3 are all irrelevant under *Sullivan*'s second prong. This relevance prong is a two-part inquiry that requires the moving party to show that the other acts evidence is "of consequence" and has probative value. *Dorsey*, 2018 WI 10, ¶44.

First, the trial court must determine whether the other acts evidence relates to a "fact or proposition of consequence." *Id.* This "of consequence" standard requires courts to consider whether the purposes offered in prong one relate to facts or propositions that help the state prove an element of the offense. *Id* at ¶48; *Sullivan*, 216 Wis. 2d at 785-86.

In the disorderly conduct charge at issue, the state must prove two elements: first, that "the defendant engaged in (violent)...(or otherwise disorderly) conduct;", second, that "the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance." WI CRIM JI 1900.

Sullivan only affirms the trial court's decision. Therefore, the defense will analyze the other acts evidence under all three *Sullivan* prongs.

Here, the court properly assessed whether the proffered other acts were of consequence. As to Act 1, the court ruled that the additional evidence from Act 1 was unnecessary to indicate to the jury why there would be some discord in the pending case, which involved a divorce and child custody issues. (50:21). The court also found that Act 2 was not essential in proving the state's case. (50:22). And, finally, the court found that Act 3 was not relevant to the facts in the charged case and that it did not address a material issue. (50:21).

On appeal, the state urges this court to reverse and find that the other acts here are analogous to those allowed in *Dorsey*. (State's Brief at 13). However, the state fails to address the fact that, in *Dorsey*, intent was a specific element of the crime charged, a battery. In *Dorsey*, evidence showing that the defendant got violent "when we felt like he was disrespected or lied to" was deemed "of consequence" and therefore relevant. *Dorsey,* 2018 WI 10, ¶49. The *Dorsey* court found that these other acts were only "of consequence" to the intent element of the Battery charges at issue in that case. *Id.* at ¶¶2, 48.

However, the state's attempt to apply *Dorsey* to the facts of this case fail, considering Disorderly Conduct, as charged here, does not have an intent element. The court properly addressed this and the state conceded as much during the motion hearing. (50:12).

This second part requires the evidence to have probative value to the case at hand. *Id.* at ¶44. Other acts have probative value if they are similar in time, place, or circumstances to the alleged act at issue. *Id.* at ¶49. While there is no formula for determining whether acts are sufficiently similar, there are a number of factors this court should consider when determining each other act's probative value. *Sullivan*, 216 Wis. 2d at 787-88. While the greater latitude principle may permit a more lenient review, it does not relieve the state's burden of demonstrating that "the other acts are similar…to the alleged crime." *Dorsey*, 2018 WI 10, ¶49 (quoting *Sullivan*, 216 Wis. 2d at 786). Here, the court properly considered the probative value (or lack thereof) of the other acts.

First, nearness in time should be considered when discerning an other act's probative value. While the state argues that "remoteness in time is not a relevant factor," binding precedent repeatedly advises courts to consider the timeframe between the other acts and the act at issue. (State's Br. 15); *see*, *e.g.*, *Dorsey*, 2018 WI 10, ¶¶47-49 (where the Supreme Court affirmed the lower court's use of time to determine the other act's probative value). As such, the circuit court in this case properly considered remoteness of time for Acts 1 and Act 2, both of which happened almost 7 years before the charged crime, were remote in time and therefore less probative. (50:21-22).

Additionally, the identity of the victims are also relevant factors when considering the similarities between two offenses for the purposes of determining probative value. *See State* v. *Gutierrez*, 2020 WI 52, ¶34. Here, again, the court properly considered the different identity of the victims when it determined a lack of relevance for Act 1 and Act 2. (50:21-22).

While the state attempts to argue that Act 3 is a "similar act" of domestic abuse by the same defendant and therefore admissible, the state fails to address the difference in victims. (State's Brief at 13). While both alleged incidents obviously involved the defendant, this is where the factual similarities end. Act 3 did not involve the defendant's father, involved wholly different conduct, and may have occurred in response to provocation by the alleged victim. (26:8). The lack of factually similar parties is relevant and demonstrates a lack of probative value as to Act 3, despite the state's argument.

Courts should also consider whether the similarities between the acts are distinct or complex. *Sullivan*, 216 Wis. 2d at 787-88. Distinct or factually complex similarities strengthen a finding that these other acts have probative value. *Id.* On the other hand, factual similarities that are not particularly unusual or complex weigh against finding probative value. *Id.* Here, the court properly considered that Act 1 was somewhat dissimilar in fact. (50:21).

The state, on appeal, urges this court to find that the level of violence in Act 1 and 2 and that all three acts involved domestic violence make them similar to the charged conduct. (State's Brief at 13). The state's argument is generic: Mr. Clucas "reacted violently and abusively to signs of his current relationship failing and that he was losing control over his domestic partner." (State's Brief at 14).

Despite the state's best effort, any similarities between the other acts and the conduct charged here is connected to motive, which is not of consequence to the case at hand and therefore inadmissible even under a greater latitude assessment. The state failed to offer additional similarities on appeal that would justify this court reversing the circuit court's discretionary decision regarding probative value.

Additionally, the other acts are, in fact, dissimilar. First, Act 1 was remote in time, involved dissimilar circumstances, and implicated a different victim. As the trial court aptly notes, the chokeholds that occurred in Act 1 were substantially more violent, threatening, and dissimilar to the single "hit" allegedly thrown in the case at hand. (50:21). While differences abound between the two acts, the thin similarities present do not involve distinct or complex circumstances that would favor finding probative value. The fact that a romantic partner is the victim of battery or disorderly conduct is not unusual or distinctive. And while the alleged victims in both cases had recently had contact with Clucas's father, interactions between a person's partner and father are

commonplace in many families. The absence of distinct similarities between the two acts, coupled with their many significant differences, compel a reasonable finding of no probative value for Act 1.

Act 2 reasonably fails *Sullivan*'s second prong for similar reasons. While the differences here are analogous to those in Act 1, the factual similarities between the two incidents are even flimsier. In Act 2, the victim had not recently contacted the defendant's father. (26:2-4). The methods of injury were also divergent and in Act 2, unlike in the case at hand, Clucas had recently been drinking heavily. (25:2; 26:2-4). Thus, the incidents bear no factual similarities except that the victims were both romantic partners. A finding of no probative value is clearly reasonable for Act 2.

And, finally, Act 3 is different in fact from the current charges. Act 3 involved no physical injury, was pre-divorce with the victim, and was an incident that resulted from the victim pouring out a bottle of Mr. Clucas's alcohol in front of him. (26:8). Additionally, Act 3 provided significant context and an explanation for Mr. Clucas's behavior—that he gets angry after he has seizures. (26:8). The current offense does not involve alcohol, was after filing of the divorce, and involved custody disputes over the children. (25:2).

iii. The circuit court properly exercised its discretion in finding that the probative value of each Act was outweighed by its prejudice to the defendant.

The court properly exercised its discretion when it determined that the other act's evidence failed *Sullivan*'s third prong. The "prejudice prong" requires courts to determine whether the other act's probative value, as assessed in the relevance prong, is substantially outweighed by its danger of unfair prejudice against the defendant. *Sullivan*, 216 Wis. 2d at 772-73; *State v. Payano*, 2009 WI 86, ¶81, 320 Wis. 2d 348, 768 N.W.2d 832. Courts applying this prejudice prong must be wary of other acts evidence that is probative of "nothing more than the defendant's propensity to act a certain way." *State v. McGowan*, 2006 WI App 80, ¶17, 291 Wis. 2d 212, 221, 715 N.W.2d 631, 636.

Unfair prejudice occurs when evidence encourages a jury to base its decision on factors other than the established facts of the case. *Sullivan,* 216 Wis. 2d at 789-90. These impermissible factors can include appealing to the jury's sympathies, confusing the jury, or compelling a jury to "convict the defendant because the other acts of evidence show him to be a bad man." *Id.*; *Dorsey*, 2018 WI 10, ¶8 n.12; *see also State v. Fishnick*, 127 Wis. 2d 247, 261-62, 378 N.W.2d 272, 280 (1985). These prejudicial factors are intensified when the other acts are graphic, disturbing, or arouse a "sense of horror." *See Sullivan*,

216 Wis. 2d at 789-90; *State v. Veach*, 255 Wis. 2d 390, 648 N.W.2d 447.

Sullivan provides an illuminating example of applying this third principle in similar circumstances. *Sullivan*, 216 Wis. 2d 768. In *Sullivan*, the defendant was charged with battery after repeatedly punching his girlfriend while intoxicated. *Id.* at 776. At trial, the court admitted other acts evidence of a previous domestic disturbance where the defendant, while intoxicated, threatened to assault his ex-wife and called her a "bitch." *Id.* at 779. On appeal, the Wisconsin Supreme Court, using the greater latitude rule, found that this other act failed this prejudice prong. *Id.* 790-92. The Court reasoned that making this other act an integral part of the case, when it had few distinctive factual similarities to the alleged incident at issue, created a danger of unfair prejudice that substantially outweighed any probative value. *Id.* at 789-91. As a result, the Court found that the trial court erroneously exercised its discretion in admitting this other act as evidence. *Id.* at 789.

Here, the trial court made a discretionary determination that any probative value found in Acts 1, 2, or 3 was substantially outweighed by each act's danger of creating unfair prejudice against the defendant. (50:20-22). This decision is supported by the similar ruling in *Sullivan* and the reasons the court set forth for refusing to admit overly prejudicial other acts. Specifically, presenting all three acts together will create a pattern of evidence that will surely encourage the jury to convict simply because

they may believe him to be a "bad man." Additionally, Act 1 involves substantially more graphic and disturbing behavior than the actions in case at hand, which compounds the risk of prejudice against the defendant. (25:8-9). Act 2 also involved disturbing conduct by the defendant. *(*26:2-3). Finally, the impetus for the defendant's actions in Act 3 were also unclear which, as the court appropriately noted, will only heighten confusion amongst the jury. (50:20-21). All these factors cumulatively create an immense risk of unfair prejudice against the defendant. On the other hand, as explained previously, these acts provide little, if any, probative value.

The state offers no argument, except to say that the *Dorsey* court ruled that the defendant didn't meet its burden to show that the prejudice substantially outweighed the probative value of the other act evidence, as to why this court abused its discretion by denying its request on Act 1, 2, and 3. (State's Brief at 16-17). However, the procedural posture of *Dorsey* is different than this case. In *Dorsey,* the defendant was challenging the court's ruling that *allowed* other acts evidence. *Dorsey,* 2018 WI 10, ¶52. It was therefore on the defendant to show how the court's ruling was erroneous—how the prejudicial value of the evidence substantially outweighed the probative value. *Id.* This case is a state's appeal—the state has the burden to show how the court's ruling was erroneous. The state fails to provide any argument as to why the court's ruling was an erroneous exercise of discretion.

The trial court applied the *Sullivan* analysis in the greater latitude context before correctly denying the admission of Acts 1, 2, and 3. While the trial court could have reasonably found that these other acts also failed *Sullivan*'s first and second prongs, the court accurately concluded that these other acts failed the final prejudice prong. Given the broad discretion afforded to the trial court to make evidentiary determinations, this court must affirm the trial court's decision denying the admission of Act 1, Act 2, and Act 3 at trial.

II. The trial court properly exercised its discretion in limiting the admissibility of evidence in the event the state successfully renewed its motion to admit other acts.

The trial court properly exercised its discretion in limiting how the other acts may be presented if the state successfully renews its motion to admit these other acts as evidence.

First and foremost, the state's issue is not even ripe for appeal. Act 4, which the court ruled admissible, concerned allegations from the same victim as alleged in this case. (26:12). This other act would be presented through live testimony. (50:11). Because the court ruled that the other acts evidence was not admissible, the issue of whether the court abused its discretion in requiring introduction of testimony versus a complaint with hearsay is not an issue for this court on appeal. "An issue is moot when its resolution will have no practical effect on the

underlying controversy." *Matter of Commitment of J.W.K.,* 2019 WI 54, ¶11, 386 Wis. 2d 672, 683, 927 N.W.2d 509, 515, citing *PRN Associates LLC v. State of Wisconsin Department of Administration*, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559, *see also City of Racine v. J-T Enters. Of Am., Inc.,* 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974).

In addition to the presenting a moot issue, the state cites no case law to support its position that the circuit court lacks the ability to decide how a party must present other acts evidence to a jury. Additionally, the cases cited by the state are inapplicable. First, the state cites *Hezzie R.*, which is entirely unrelated to the presentation of evidence or the court's discretion in evidentiary matters. *In Int. of Hezzie R.*, 219 Wis. 2d 848, 580 N.W.2d 660 (1998).[4]

The state also cites *Huddleston v. U.S.,*485 U.S. 681 (1988), to suggest that evidence is admissible as long as the state shows that a reasonable jury would have concluded that the defendant committed the other act. This is an erroneous application of *Huddleston*, as *Huddleston* doesn't address the actual

[4] In fact, *Hezzie R.* is unrelated to the proposition it is allegedly supposed to support in the state's brief. *Compare* Appellant Br. 19 ("And it is proper to read Wis. Stat. 904.04(2)(b) as requiring the same as the Federal Rules of Evidence 404(b)") *with In Int. of Hezzie R.*, 219 Wis. 2d 848, 580 N.W.2d 660, 676 (1998) (where the court mentions neither Wis. Stat. § 904.04(2)(b) nor the Federal Rules of Evidence when discussing the due process rights of a juvenile defendant).

issue at hand. While *Huddleston* deals with the state's burden when seeking admission of other acts evidence under Fed. R. Evid. 404(b), the case says nothing about the court's use of discretion over *how* other acts evidence are to be presented to the jury. *Id*. at 682.

In fact, the other acts evidence admitted in *Huddleston* still has to comply with the other rules of evidence. *See State v. Davidson*, 2000 WI 91, ¶¶50-52, citing *State v. Plymesser*, 172 Wis. 2d 583, 598, 493 N.W.2d 367, 374 (1992). Thus, even if this court found that the circuit court erroneously exercised its discretion on denying admission of Act 1, 2, and 3, the court still has full authority to determine *how* a party can present the evidence at trial. A trial court's ruling on how a party is required to present evidence was not at issue in *Huddleston,* as the state presented its other acts evidence through live witness testimony. Therefore, *Huddleston* is inapplicable to the case here.

In summary, the trial court's exercise of discretion in determining the presentation of other acts evidence is not ripe on appeal. Even if this issue was reviewable by this court, the state has failed to provide any evidence that trial courts have no discretion in how the state may present other acts evidence to a jury.

CONCLUSION

The trial court properly applied *Sullivan* in the greater latitude context to other acts offered by the state under Wis. Stat. § 904.04(2)(b). This court should affirm the trial court's reasonable exercise of discretion in declining to admit Act 1, Act 2, and Act 3 for trial. The court should also affirm the circuit court's decision to require the state to produce live witness testimony as to other acts in front of a jury.

Dated this 21st day of November, 2022.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,640 words.

Dated this 21st day of November, 2022.

Signed:
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